

June 12, 2009

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Mike Malik

Date of Filing: May 15, 2009

Case Number: TFA-0307

On May 15, 2009, Mr. Mike Malik appealed a determination issued by the Office of Scientific and Technical Information (OSTI) of the Department of Energy's (DOE) Oak Ridge Operations Office under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In his appeal, Mr. Malik contends that OSTI failed to provide documents responsive to his request. If the present Appeal is granted, OSTI will be ordered to release the requested information.

I. Background

On January 30, 2009, Mr. Malik filed a request in which he sought the following computer software packages: (1) SW AP-9 (nesc0828)- 1-D Stress Analysis for Hydrostatic and Elastic Plastic Materials; (2) THEMP3D (nesc9766) - 3-D Time-Dependent Elastic Plastic Flow; and (3) TOODY -2 (nesc0627) - Lagrangian Nonlinear Wave Propagation in 2-D X-Y or Cylindrical Geometry. On February 18, 2009, OSTI issued a determination in which it stated that the Energy Science and Technology Software Center (ESTSC) conducted a search of its files and located no responsive records. *See* February 18, 2009 Determination Letter at 1. However, on April 13, 2009, OSTI issued a supplemental response to its February 18, 2009 Determination Letter. In that response, OSTI indicated that it re-examined the parameters of Mr. Malik's request and determined that ESTSC is the office most likely to maintain the requested records. *See* April 13, 2009 Determination Letter. OSTI further stated that ESTSC conducted a search of its files for the software packages but did not find copies as it does not physically maintain copies of such records. *Id.* OSTI stated that the packages requested by Mr. Malik are maintained by the Nuclear Energy Agency of the Organization for Economic Cooperation and Development (NEA). <sup>1/</sup> Finally, OSTI stated that

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<sup>1/</sup> Pursuant to a Cooperative Agreement between the DOE and the NEA, American requests for software programs are handled by DOE centralized software management facilities. The ESTSC is the facility responsible for handling requests for all codes with -NESC prefixes, which include the three packages that Mr. Malik requested. *Id.*

(continued...)

NEA, through DOE, will be able to provide Mr. Malik with the packages. However, it stated that copies of these packages will cost \$1,137.00 each, at a total cost of \$3,411.00. 2/ *Id.* In his Appeal, Mr. Malik contends that ESTSC's fee schedule "is not applicable." *See* Appeal Letter at 1. He asserts that "only regular FOIA pricing statutes are applicable." *Id.* Mr. Malik asks OHA to order OSTI to release the requested software packages and that he be charged "pursuant to charges authorized by FOIA statutes," specifically copying costs. *Id.* at 3. 3/ To further support his Appeal, Mr. Malik notes, *inter alia*, that the packages that he requests are not included in a "selective list" of ESTSC packages offered for sale and are not part of the ESTSC rate structure that was quoted to him. *Id.* at 2. He also contends that precedent has already been set by his previous FOIA request in which he requested a similar record, the requested record was provided to him and no copying fees were charged. *Id.*

## II. Analysis

In its Determination Letter, OSTI informed Mr. Malik that NEA, through DOE, would be able to provide the requested records. However, the total cost of the packages would be \$3,411.00. As stated above, Mr. Malik asserts in his Appeal that ESTSC's rate structure is not applicable and that he had previously requested a similar record pursuant to a FOIA request and the software package was provided to him at no cost (although he states that he was willing to pay copying costs pursuant to the FOIA). We contacted ESTSC for a response to Mr. Malik's Appeal. *See* Record of Telephone Conversation between Kimberly Jenkins-Chapman, OHA and Kim Buckner, ESTSC (June 3, 2009). With regard to Mr. Malik's assertion that he had previously requested a similar record and received it, ESTSC explained that when Mr. Malik requested this package, the office searched its database and located an entry for the software package. *Id.* However, the database record indicated that this software package was inactive and that ESTSC no longer offered it for purchase. *Id.* However, ESTSC indicated that after searching its CD master file, it located a copy of a CD that had been obtained from NEA in previous years. *Id.* ESTSC stated that it decided to make the CD to available to Mr. Malik at no charge since it no longer offered the package for sale. In addition, since it did not have an electronic copy of the manual that went with the package, ESTSC asked NEA for a copy of the manual which it acquired in PDF format. ESTSC further stated that this was the only item it obtained from the NEA for this FOIA request. *Id.*

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1/ (...continued)

2/ OSTI also indicated that the requested packages have been discounted by 40% because they are more than eight years old.

3/ In his Appeal, Mr. Malik specifically requests the following: (1) that the requested records be provided along with a signed certification by the General Counsel that the certified copies of the original records are being provided without any tampering; (2) that the requested records be provided expeditiously; (3) that penalties be assessed "pursuant to 10 C.F.R. § 552," as the actions are arbitrary and capricious and (4) that an investigation be conducted to identify a possible third party who may have been involved in "behind the scene deliberations" with OSTI. Mr. Malik has not provided any proof or documentation of these allegations regarding his requested records. Moreover, these requests are beyond the scope of the FOIA.

According to ESTSC, unlike Mr. Malik's previous FOIA request which consisted of a unique set of circumstances, his current FOIA request would be processed according to its normal procedure for obtaining software from NEA. ESTSC stated that once it receives a request from a customer for a software package available from NEA, if the customer ensures that it is interested in purchasing the package, then ESTSC contacts NEA and requests a copy of the package. *Id.* NEA then ships the package to ESTSC, it is processed, inputted in a database and announced on the Internet via ESTSC's web page. ESTSC stated that the price of the package "is based on the type of customer and the type of computer for which the package is written." *Id.* After the package is processed, ESTSC sends the customer a price quote and a license agreement. When the customer returns payment for the package along with the license agreement, ESTSC processes the order and ships the package to the customer. *Id.* According to ESTSC, Mr. Malik's current request would be handled pursuant to this procedure. 4/

We find ESTSC procedure and fee structure to be appropriate. It is generally true that an agency may not withhold documents in its possession solely because the requester can obtain the document from a source outside that agency. An agency need not provide to a requester documents that "have been previously published or made available by the agency itself." *Department of Justice v. Tax Analysts*, 492 U.S. 136 at 152 (1988). Since the DOE has chosen to make the records in question publicly available through ESTSC, OSTI is not required by the FOIA to provide this document to Mr. Malik directly, and may instead refer him to the location where the document is available. *See Henry, Lowerre, Johnson, Hess & Frederick*, 25 DOE ¶ 80,141 at 80,598 (1995); *Daniel Grossman*, 22 DOE ¶ 80,117 at 80,537 (1992). Mr. Malik would then be required to pay the accompanying fees as set forth by ESTSC. Accordingly, Mr. Malik's appeal is denied. 5/

It Is Therefore Ordered That:

- (1) The Appeal filed by Mike Malik, OHA Case No. TFA-0307, on May 15, 2009, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the

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4/ In his Appeal, Mr. Malik asserts that ESTSC has a "selective list" of computer programs that it offers for sale and the packages he requested are not part of that "selective list." *See* Appeal at 2. ESTSC, which serves as the DOE's central repository for scientific and technical software developed at DOE laboratories, has indicated that it does not know what Mr. Malik means by a "selective list," but that the package codes that are submitted to the ESTSC and which have either a copyrighted or unlimited distribution, are announced through the ESTSC Home Page on the Internet. According to ESTSC, a package may not be announced on the web if it has given a "limited" distribution by the submitting organization. *Id.*

5/ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: June 12, 2009